87-1847

No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

RACHEL ARONSON, a Minor, by Pamela Aronson, her Mother, on behalf of herself and all others similarly situated,

Petitioner,

-against-

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

Robert Aronson, Esq.
95 State Street
Springfield, MA 01103
(413) 733-2600

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Massachusetts Supreme Judicial Court (the highest court in Massachusetts) denied Massachusetts taxpayers, who have been required to pay Massachusetts income tax pursuant to M.G.L. c. 62, §§2(b) and 4, in violation of the Commerce Clause and the Equal Protection Clause, of their property without due process of law by arbitrarily refusing to certify a class of such taxpayers when, in the absence of certification, such taxpayers will be effectively precluded from obtaining a refund of the unconstitutional tax?

2. Whether M.G.L. c. 62, §§2(b) and 4, is repugnant to the Equal Protection Clause of the United States Constitution?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

Petitioner respectfully prays that a writ of certiorari issue to review the opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts (the

highest court in Massachusetts).

OPINIONS BELOW

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts is reported at 401 Mass. 244, 516 N.E. 2d 137 (1987), and is contained in Appendix A. The decision of the Supreme Judicial Court which denied petitioner's Petition For Rehearing is not reported and is contained in Appendix B. The memorandum and order of the Massachusetts Superior Court (Hampden County) is not reported and is contained in Appendix C.

JURISDICTION

The decision of the Supreme Judicial Court was entered on December 14, 1987, and petitioner's Petition For Rehearing was denied on January 25, 1988. This Court's jurisdiction is invoked pursuant

to 28 U.S.C. §1254(1) and 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Chapter 62, §2(b), of the Massachusetts General Laws provides, in pertinent part, that:

> Massachusetts gross income shall be divided into two classes:
>
> (1) Part A gross income shall be the total interest, dividends and net capital gain, included in Massachusetts gross income, other than: (A) Interest and dividends from savings deposits, including term and time deposits having a principal amount of less than one hundred thousand dollars, savings accounts, share or share savings accounts in any savings or cooperative bank, trust company or credit union incorporated in or chartered by the commonwealth; in any national bank, federal savings and loan association or federal credit union located in the commonwealth; in any banking company or Morris Plan company subject to chapter one hundred and seventy-two A; in any savings or loan association under the

supervision of the commissioner of banks.

* * *

(2) Part B gross income shall be the remainder of the Massachusetts gross income.

2. Chapter 62, §4, of the Massachusetts General Laws provides, in pertinent part, that:

(a) Part A taxable income shall be taxed at the rate of ten percent.

(b) Part B taxable income shall be taxed at the rate of five percent.

3. The Commerce Clause of the United States Constitution (Art. 1, §8, Cl. 3) provides, in pertinent part:

The Congress shall have power ... to regulate commerce ... among the several states ... .

4. The Due Process and Equal Protection Clauses of the United States

Constitution (Art. 14, §1) provide, in pertinent part:

> No state shall ... deprive any person of life, liberty , or property, without due processs of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5. Rule 23(a) of the Massachusetts Rules of Civil Procedure provides that:

> (a) Prequisites to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

STATEMENT OF THE CASE

During the period from October 1 to December 31, 1983, petitioner was a

resident of Massachusetts and earned interest on money deposited in banks which were located outside of Massachusetts.

In accordance with M.G.L. c. 62, §§2(b) and 4, petitioner paid Massachusetts resident income tax for the 1983 tax year on the interest earned in banks outside of Massachusetts at the rate of 10%. Had such interest been earned in banks within Massachusetts, M.G.L. c. 62, §§2(b) and 4, would only have required petitioner to pay tax at the rate of 5% (and petitioner would have paid approximately $71 less in tax).

Petitioner, therefore, commenced this action on behalf of herself, and on behalf of a class composed of Massachusetts taxpayers who have paid the 10% (additional 5%) tax on interest earned in banks outside of Massachusetts, seeking a declaratory judgment that M.G.L. c. 62,

§§2(b) and 4, is unconstitutional on the grounds that, inter alia:

(1) it discriminates against banks outside of Massachusetts (and confers a direct commercial advantage upon banks within Massachusetts) and, consequently, violates the Commerce Clause; and

(2) it is not reasonably related to any legitimate governmental purpose and, consequently, violates the Equal Protection Clause.

The Massachusetts Superior Court held, inter alia, that the 10% tax violated neither the Commerce Clause nor the Equal Protection Clause and, therefore, denied petitioner's motion for summary judgment, granted respondent's (cross) motion for summary judgment and dismissed the action. Appendix C, pp. C1-C7. The Superior Court did not rule on petitioner's motion for class action

certification.

On appeal, the Supreme Judicial Court reversed the granting of summary judgment with respect to the Commerce Clause, affirmed the granting of summary judgment with respect to the Equal Protection Clause and refused to certify the action as a class action.

REASONS FOR GRANTING THE WRIT

I

DENIAL OF CLASS CERTIFICATION IS A DENIAL OF DUE PROCESS

M.G.L. c. 62, §§2(b) and 4, imposes a 10% tax on interest earned by Massachusetts residents in banks outside of Massachusetts, but only a 5% tax on interest earned by Massachusetts residents in banks within Massachusetts. In remanding the issue of whether the 10% tax violates the Commerce Clause, the Supreme Judicial Court held that M.G.L. c. 62, §§2(b) and 4, "facially ... discriminates in favor of in-State banks in competition for Massachusetts deposits" (516 N.E. 2d at 141 (Appendix A, p. A13)) and that respondent had:

> failed to demonstrate the required "close fit" between the asserted statutory purpose of requiring

> interstate commerce to pay its way and the statutory means of assessing higher taxes on out-of-State interest income.

516 N.E. 2d at 142 (Appendix A, p. A21).

Although the Supreme Judicial Court recognized the constitutional infirmity of M.G.L. c. 62, §§2(b) and 4, it refused to certify this action as a class action.

In the absence of class certification (and assuming the 10% tax is ultimately held to be unconstitutional under the Commerce and/or Equal Protection Clauses), each member of the putative class will be required to commence a separate proceeding under M.G.L. c. 62C in order to obtain a refund of the unconstitutionally imposed 10% tax. The possibility of each putative class member obtaining a refund by such a procedure, however, is virtually non-existent because:

(1) Most members of the putative

class will not even be aware that the 10% tax has been held to be unconstitutional and, therefore, will not attempt to apply for a refund.

(2) Even if a member of the putative class were aware that the 10% tax had been held unconstitutional, the relative small amount of the refund to which each class member would be entitled will effectively preclude the class member from incurring the time and expense of commencing a proceeding to recover the refund.

(3) Even if a member of the putative class were aware that the 10% tax had been held unconstitutional and commenced a proceeding to recover the same, the three (3) year limitation period contained in M.G.L. c. 62C, §37, will bar the claims of numerous class members by the time the constitutionality of the 10% tax is finally determined.

In contrast, if the class were certified, each member of the class would automatically be entitled to a refund without the necessity of commencing separate proceedings and any applicable limitation period would be stayed as of the filing date of this action (see Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983)).

Thus, by refusing to grant class certification, the Supreme Judicial Court has deprived most members of the putative class of their property without due process of law by foreclosing the only procedure which would permit them to obtain a refund of the unconstitutional 10% tax.

In addition, since class certification has been (finally) denied, as a practical matter petitioner will in all likelihood be unable to further prosecute

this action. Therefore, not only will most members of the putative class be denied the ability to obtain a refund, but in the absence of class certification the constitutionality of the 10% tax may never even be determined and Massachusetts will be permitted to continue to impose the tax with impunity.

Lastly, the conclusory grounds relied upon by the Supreme Judicial Court in refusing to grant certification (vis-a-vis the criteria contained in Mass. R. Civ. P. 23(a)) are unsupportable at best and arbitrary and patently parochial at worst.

> The judge did not pass on Aronson's request that a class be certified in this proceeding. We add comment on the intended class action aspect of this proceeding because at some stage the question may be brought forward. It is one thing to tolerate, outside normal administrative procedures, an action for declaratory relief involving one taxpayer if the issue is important and of general applicability, and thus we have

> not always required that the matter first be decided by the Appellate Tax Board. Where, however, an attempt is made to obtain refunds of substantial amounts of money on behalf of numerous unidentified taxpayers, the procedures of the administrative process should not be bypassed. Tax collectors and other public officials are entitled to know what portion of collected revenues is subject to challenge and are entitled to insist on adherence to fixed schedules for timely applications for abatement and for other steps in the administrative process. We find unacceptable such an open-ended contingent liability based on an action for declaratory relief. A class should not be certified in actions of this character.

516 N.E. 2d at 144 (Appendix A, p. A28).

Contrary to being "unacceptable" because of the substantial amounts of money owed to unidentified taxpayers, a class action is the best (indeed only) procedure for permitting such taxpayers to obtain a refund of the unconstitutional 10% tax. As stated in Eisen v.

Carlisle & Jacquelin, 391 F. 2d 555, 560 (2d Cir. 1968):

> Class actions serve an important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.

See 3B J. Moore, Moore's Federal Practice, ¶23.45[3] (2 ed. 1987).

Thus, courts have not been hesitant to hold that a class action is an appropriate procedure for obtaining refunds from governmental authorities. See, e.g., Clark v. Lee, 273 Ind. 572, 406 N.E. 2d 646 (1980); Thorn v. Jefferson County, 375 So. 2d 780 (1979); Ware v. Idaho State Commission, 98 Idaho 477, 567 P. 2d 423 (1977); Javor v. State Board Of Equalization, 117 Cal.

Rptr. 305, 527 P. 2d 1153 (1974); Fiorito v. Jones, 39 Ill. 2d 531, 236 N.E. 2d 698 (1968); Commonwealth v. Scott, 112 Ky. 252, 65 S.W. 596 (1901); and Whaley v. Commonwealth, 110 Ky. 154, 61 S.W. 35 (1901).

Whether the "[t]ax collectors and other public officials ... know what portion of collected revenues is subject to challenge", or whether there is "adherence to fixed schedules for timely applications for abatement", should have no bearing on the obligation of Massachusetts to make refunds of an unconstitutional tax. Nor did the Supreme Judicial Court state the reason the knowledge of the tax collectors/public officials or adherence to fixed schedules prevented certification (or cite any authority in support of such a rule).

Indeed, tax collectors/public offi-

cials could, in fact, determine (assuming they do, or should, not presently know) the "portion of collected revenues ... subject to challenge" by merely calculating from the records in their possession the amount of the unconstitutional (additional 5%) tax which has been paid to Massachusetts by the putative class members.

Furthermore, predicating class action certification in tax cases upon the knowledge of tax collectors/public officials with respect to the amount of a challenged tax will ironically mean that ignorance on the part of public officials is a primary defense to certification.

Finally, class action certification would not permit the administrative process to be "bypassed" since the vast majority of putative class members will either not attempt to invoke or will be

barred from invoking the refund procedure (supra). Rather, certification would merely allow the putative class members to obtain a refund of the unconstitutional tax which they will otherwise be unable to recover administratively.

Issuance of a writ of certiorari is, therefore, imperative. Absent a writ, the denial of class certification can not be reversed and, as a result:

(1) taxpayer/members of the putative class will be deprived of their property without due process of law,

(2) the constitutionality of the 10% tax under the Commerce Clause and the Equal Protection Clause may never be determined, and

(3) Massachusetts will be allowed to retain, and to continue to impose, the unconstitutional 10% tax.

II

THE 10% TAX VIOLATES THE EQUAL PROTECTION CLAUSE

Equally untenable is the holding of the Supreme Judicial Court that M.G.L. c. 62, §§2(b) and 4, complied with the mandates of the Equal Protection Clause (particularly when it recognized the generally accepted rule that constitutional issues should not be resolved by summary judgment).

> In light of the Commonwealth's rationale and supporting affidavits, we are satisfied that summary judgment was properly granted as to the equal protection claim. "So long as any basis of fact can be reasonably conceived showing that the distinction made by a tax statute has a fair and rational relationship to the object sought to be accomplished, the legislative classification is not violative of equal protection principles. Seiler Corp. v. Commissioner of Revenue, 384 Mass. 635, 639, 429 N.E. 2d 11 (1981). See Madden v. Kentucky, 309 U.S. 83, 87-90, 60 S. Ct. 406, 407-409, 84 L. Ed. 590 (1940).

516 N.E. 2d at 143 (Appendix A, p. A24).

Respondent's only justification for the 10% tax, as set forth in the affidavits of two tax officials, was that it is more expensive to verify the amount of interest earned in banks outside of Massachusetts and to collect any unpaid 10% tax than if a taxpayer's money were deposited in banks within Massachusetts.

This justification, however, was (it is submitted) completely rebutted by petitioner's arguments which established, virtually as a matter of law, that it is not more expensive to verify and collect the 10% tax because, inter alia:

(1) Respondent is able to obtain Form 1099 interest information from the Internal Revenue Service and, therefore, the cost of verifying interest earned in banks outside of Massachusetts is the same

as the cost of verifying interest earned in banks within Massachusetts.

(2) As the Supreme Judicial Court noted, respondent did not "explain ... why out-of-State income other than interest income is not taxed at a higher rate than corresponding types of in-state income." 516 N.E. 2d at 142 (Appendix A, p. A20).

Moreover, the Supreme Judicial Court recognized the inadequacy of respondent's affidavits in remanding the Commerce Clause issue for further proceedings.

> [T]he Steele and Crowley affidavits are almost entirely conclusory in nature. They lack the specificity necessary to establish as a matter of law that there is a reasonable relationship between the costs to which they refer and a two to one differential. Therefore, the Commonwealth has failed to demonstrate the required "close fit" between the asserted statutory purpose of requiring interstate commerce to pay its way and the statutory means of assessing higher taxes on out-of-State interest income. Thus, the Commonwealth is not entitled to

> summary judgment in its favor on the commerce clause claim.

516 N.E. 2d at 142 (Appendix A, p. A21).

Since respondent's affidavits were properly held to be insufficient to determine the Commerce Clause issue, it was at least inconsistent for the Supreme Judicial court to conclude, based upon the same affidavits, that the 10% tax has a "fair and rational relationship to the object sought to be accomplished" and, therefore, complied with the Equal Protection Clause.

While scrutiny of the constitutionality of a tax under the Equal Protection Clause is "restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it" (United States v. Carolene Products Co., 304 U.S. 144, 154 (1938)), the "constitutionality of a

statute predicated upon the existence of a particular set of facts may be challenged by showing to the court that those facts have ceased to exist ... [and] may be assailed by proof of facts tending to show that the statute ... is without support in reason ... ." Id. at 153.

Here petitioner demonstrated that the only basis which was relied upon by respondent for the imposition of the 10% tax (the alleged increased expense of verification and collection) is factually unsupportable and, accordingly, that the tax is arbitrary, capricious and not reasonably related to a legitimate governmental object. Allied Stores Of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959); Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869 (1985). Indeed, the Supreme Judicial Court reached practically the same conclusion in holding that respondent

had failed to "establish as a matter of law that there is a reasonable relationship between the cost [of verification and collection] ... and a two to one tax difference." 516 N.E. 2d at 142 (Appendix A, p. A21).

Therefore, if a writ of certiorari is not issued, the clearly erroneous holding of the Supreme Judicial Court that M.G.L. c. 62, §§2(b) and 4, does not violate the Equal Protection Clause will become final.

CONCLUSION

In the absence of the issuance of a writ of certiorari, not only will numerous Massachusetts taxpayers be unable to obtain a refund of the unconstitutionally imposed 10% tax, but the constitutionality of the 10% tax under either the Commerce Clause or the Equal Protection Clause may never be determined.

Respectfully submitted,

Robert Aronson, Esq.
95 State Street
Springfield, MA 01103
(413) 733-2600

APPENDIX A

Rachel Aronson[1]

v.

Commonwealth.

Supreme Judicial Court of Massachusetts, Hampden.

Argued Feb. 5, 1987.

Decided Dec. 14, 1987.

Before Wilkins, Liacos, Abrams, Nolan and O'Connor, JJ.

O'Connor, Justice.

Under G.L. c. 62, §§ 2(b) and 4 (1986 ed.), interest earned by Massachusetts residents on money deposited in non-Massachusetts financial institutions is taxed at the rate of ten per cent, while interest earned on money deposited in Massachusetts financial institutions is generally taxed at a five per cent rate. Pt2PtPt3Pt Aronson alleges, and the Com-

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1. [Footnotes are set forth at the end of the opinion.]

monwealth concedes, that she was taxed at the higher rate on interest income earned in 1983 because her money was in a non-Massachusetts bank. The complaint requests a declaratory judgment that the tax differential is unconstitutional and, in addition, an order requiring the refund of any tax collected unlawfully. In the trial court, the plaintiff sought leave to maintain the action as a class action on behalf of all residents of the Commonwealth who have paid the higher rate on interest earned from non-Massachusetts financial institutions. There has been no ruling on the request for class certification.

Both parties moved for summary judgment. Aronson's motion was unaccompanied by affidavits or other supporting materials. The Commonwealth's motion was supported by two affidavits of State

officials generally asserting audit, verification, and collection problems associated with non-Massachusetts income earned by Massachusetts residents. We discuss those affidavits more fully below. A judge denied Aronson's motion and allowed the Commonwealth's motion. The judge concluded that the differential tax rates do not violate the equal protection, due process, privileges and immunities, or commerce clauses of the United States Constitution or art. 44 of the Amendments to the Massachusetts Constitution. Aronson appealed and we granted her application for direct appellate review. We now affirm the denial of Aronson's summary judgment motion, but we reverse the judgment for the Commonwealth and remand the case to the Superior Court for further proceedings limited to the commerce clause claim.

On appeal, Aronson challenges the allowance of the Commonwealth's summary judgment motion and the denial of her own motion on the grounds that the tax violates the equal protection and commerce clauses of the United States Constitution and art. 44 of the Amendments to the Massachusetts Constitution. As a preliminary to discussion of these issues, we observe that the Commonwealth has not argued that we should decline to reach them due to Aronson's failure to exhaust administrative remedies. Furthermore, we recognize that this case raises important public questions which ought to be resolved. Polaroid Corp. v. Commissioner of Revenue, 393 Mass. 490, 491 n. 3, 472 N.E. 2d 259 (1984). Andover Sav. Bank v. Commissioner of Revenue, 387 Mass. 229, 232-233, 439 N.E. 2d 282 (1982). However, the Commonwealth has argued in a footnote

to its brief, that the "[p]laintiff cannot assert the injury, if any, suffered by non-Massachusetts banks," citing Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472, 102 S. Ct. 752, 758, 70 L. Ed. 2d 700 (1982). There is no indication in the record that at the trial level the Commonwealth raised any question about the plaintiff's standing to challenge the constitutionality of the tax differential provided by G. L.c. 62, §§2(b) and 4. The Commonwealth is not entitled to raise that question for the first time on appeal. Lyon v. Bloomfield, 355 Mass. 738, 743, 247 N.E. 2d 555 (1969). Henchey v. Cox, 348 Mass. 742, 747, 205 N.E. 2d 715 (1965). In any event, a plaintiff who alleges that she has been forced to pay an unconstitutional tax alleges an injury personal to her, and

she has "the right to test in court the questions of constitutionality and of injury." Luscomb v. Bowker, 334 Mass. 468, 475-476, 136 N.E. 2d 192 (1956). See Boston Stock Exch. v. State Tax Comm'n., 429 U.S. 318, 320 n. 3, 97 S. Ct. 599, 602 n. 3, 50 L. Ed. 2d 514 (1977).

We first consider whether the challenged tax violates the commerce clause of the United States Constitution. The commerce clause, art. 1, §8, cl. 3, gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States ...." This explicit grant of power to Congress also serves as an implicit restraint on the power of the States to regulate interstate commerce. Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35, 100 S. Ct. 2009, 2015, 64 L. Ed. 2d 702 (1980). Once a State tax is subject to commerce clause scrutiny, it will

be upheld only if it meets the four part test of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279, 97 S. Ct. 1076, 1079, 51 L. Ed. 2d 326 (1977): the tax (1) must be applied to an activity with a substantial nexus with the taxing State; (2) must be fairly apportioned; (3) may not discriminate against interstate commerce; and (4) must be fairly related to the services provided by the State.

Before the Brady test applies, however, the tax must have sufficient effect on interstate commerce to evoke commerce clause scrutiny. See Andover Sav. Bank v. Commissioner of Revenue, supra 387 Mass. 248, 439 N.E. 2d 282. Therefore, we must address that question first. Initially, we note that "[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." Philadelphia v. New Jersey, 437

U.S. 617, 622, 98 S. Ct. 2531, 2534, 57 L. Ed. 2d 475 (1978). In Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 97 S. Ct. 599, 50 L. Ed. 2d 514 (1977), the Court held unconstitutional a State law that imposed a higher tax on securities transactions occurring outside the State than on most such transactions within the State. Implicit in the Court's decision was the notion that investment funds, including deposits in savings banks, are objects of commerce.

There can be no doubt that the commerce in savings deposits involved in this case is "interstate" since Massachusetts residents and out-of-State banks are involved. Furthermore, the fact that the tax is levied on taxpayers' income, rather than on the interstate transaction directly, is irrelevant. "The label by which a tax is known should not control the con-

stitutional principles by which it is judged." George S. Carrington Co. v. State Tax Comm'n, 375 Mass. 549, 552 n. 3, 377 N.E. 2d 950 (1978). See Maryland v. Louisana, 451 U.S. 725, 756, 101 S. Ct. 2114, 2134, 68 L. Ed. 2d 576 (1981); Dominion Nat'l Bank v. Olsen, 771 F. 2d 108, 118 (6th Cir. 1985)(Contie, J., concurring)("the fact that the challenged tax is assessed against receipt of income in Tennessee rather than against an interstate transaction .... is irrelevant").

It is clear, then, that the challenged tax is a tax on interstate commerce. That leads us to inquire whether the impact of the tax rate differential on interstate commerce is more than minimal or speculative. Relying on Andover Sav. Bank v. Commissioner of Revenue, supra 387 Mass. at 245-250, 439 N.E. 2d 282, the judge concluded that "[a]ny burden on

interstate commerce is too speculative to evoke the provision of the Commerce Clause." We agree with the principle that the burden on interstate commerce imposed by a particular tax may be so speculative that the commerce clause is not implicated. However, the tax in question is not such a tax.

Andover Sav. Bank v. Commissioner of Revenue, supra, involved a State law that allowed banks, when computing the deposits portion of a bank excise tax, to deduct the unpaid balance on loans secured by real estate taxable in Massachusetts or by certain real estate in contiguous States, but not loans secured by other real estate. The banks asserted that this geographical limitation discouraged local banks from lending in other States, thus discriminating against interstate commerce. In discussing whether the tax

unlawfully protected local borrowers at the expense of out-of-State borrowers, this court noted that any burden on out-of-State borrowers was too speculative to evoke the prohibitions of the commerce clause. We reasoned that the deposits tax involved in that case appeared to be too insignificant to discourage out-of-State lending by Massachusetts banks, and that, even if it did discourage such lending, out-of-State lenders would probably fill any gap left by Massachusetts banks. Id. at 248, 439 N.E. 2d 282.

The circumstances in Andover were significantly different from those in the present case. Therefore, the analysis in Andover in inappropriate here. Unlike in Andover, the doubling of the tax rate solely because of the location of the taxpayer's deposits, challenged in this case, clearly has a protectionist effect

in favor of local financial institutions. "Such a large tax penalty ... cannot be deemed to have no practical effect on interstate commerce" (footnote omitted). Boston Stock Exch. v. State Tax Comm'n, supra 429 U.S. at 334, 97 S. Ct. at 609. Therefore, commerce clause scrutiny is required, and we turn to the four-part test set forth in Complete Auto Transit, Inc. v. Brady, supra 430 U.S. at 279, 97 S. Ct. at 1079.

Aronson focuses, as do we, on the third part of that test - the requirement that taxes must not discriminate against interstate commerce. "The principal object of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce." CTS Corp. v. Dynamics Corp. of America, __ U.S. __, 107 S. Ct. 1637, 1648, 95 L. Ed. 2d 67 (1987). The Supreme Court has repeatedly struck

down State statutes that have "encouraged the development of local industry by means of taxing measures that imposed greater burdens on economic activities taking place outside the State than were placed on similar activities within the State." Westinghouse Elec. Corp. v. Tully, 466 U.S. 388, 403-404, 104 S. Ct. 1856, 1866, 80 L. Ed. 2d 388 (1984). See Armco Inc. v. Hardesty, 467 U.S. 638, 642, 104 S. Ct. 2620, 2622, 81 L. Ed. 2d 540 (1984). States may not discriminate against interstate commerce in favor of in-State interests by "foreclos[ing] tax-nuetral decisions." Westinghouse Elec. Corp. v. Tully, supra 466 U.S. at 406, 104 S. Ct. 1867, quoting Boston Stock Exch., supra 429 U.S. at 331, 97 S. Ct. at 608. Here, although the statute may well ultimately withstand constitutional scrutiny, facially it discriminates in favor of in-State

banks in competition for Massachusetts deposits, and thereby forecloses tax-neutral decisions. See Dominion Nat'l Bank, supra at 119 (Contie, J., concurring). Compare Towle v. Commissioner of Revenue, 397 Mass. 599, 606, 492 N.E. 2d 739 (1986); Commonwealth v. Allied Bond & Collection Agency, 394 Mass. 608, 613-615, 476 N.E. 2d 955, dismissed for want of a substantial Federal question, 474 U.S. 991, 106 S. Ct. 401, 88 L. Ed. 2d 353 (1985). Therefore, further inquiry is necessary.

While a legislative intent to favor local interests is almost invariably fatal to any statute burdening interstate commerce, see Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 271-273, 104 S. Ct. 3049, 3055-3056, 82 L. Ed. 2d 200 (1984); Westinghouse Elec. Corp. v. Tully, supra 466 U.S. at 405, 104 S. Ct at 1866; Boston

Stock Exch., supra 429 U.S. at 329, 97 S. Ct. at 606; Dominion Nat'l Bank, supra at 117 (Contie, J., concurring); it is axiomatic that "interstate commerce may constitutionally be made to pay its way." Maryland v. Louisana, 451 U.S. 725, 754, 101 S. Ct. 2114, 2133, 68 L. Ed. 2d 576 (1981). Therefore, differentials in State administrative costs between intrastate and interstate commerce may justify differential tax treatment. See L. Tribe, American Constitutional Law §6-16, at 355 (1978)(State tax burdening interstate enterprises more than local interests not unconstitutionally discriminatory if State can show additional administrative costs in taxing out-of-State businesses). Cf. Maryland v. Louisana, supra at 759, 101 S. Ct. at 2135 (a seemingly discriminatory tax may be upheld if tax is actually "compensatory," and, when viewed in light

of other taxes, the challenged tax simply provides for equal treatment between local and interstate commerce).

However, "once a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose' and that this purpose could not be served as well by available nondiscriminatory means." Maine v. Taylor, 477 U.S. 131, 106 S. Ct. 2440, 2448, 91 L. Ed. 2d 110 (1986), quoting Hughes v. Oklahoma, 441 U.S. 322, 336, 99 S. Ct. 1727, 1736, 60 L. Ed. 2d 250 (1979). In meeting the first prong of the test enunciated in Maine v. Taylor, supra, the demonstration that the statute serves a legitimate local purpose, the State must show a "close fit" between its asserted (nondiscriminatory) purpose, and the

facially discriminatory statute; the statute must be "narrowly tailored" to serve the State's purpose. Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 957-958, 102 S. Ct. 3456, 3464-3465, 73 L. Ed. 2d 1254 (1982). Furthermore, the "proffered justification for any local discrimination ... must be subjected to 'the strictest scrutiny.'" Maine v. Taylor, supra 106 S. Ct. at 2451, quoting Hughes v. Oklahoma, supra 441 U.S. at 337, 99 S. Ct. at 1737. When subjected to that scrutiny, the State's affidavits in this case, even though unmet by conflicting affidavits, do not entitle it to summary judgment.

The Commonwealth's motion for summary judgment was supported by an affidavit of Sandra Steele, associate deputy commissioner of the enforcement division of the Department of Revenue, and by an affidavit

of Bernard Crowley, chief of the multi-state audit bureau of the Department of Revenue. Steele's affidavit concerns collection costs. It states that the Department of Revenue "has the authority to levy upon any property (e.g., real estate, bank accounts) located in the Commonwealth to satisfy an unpaid liability owed by a taxpayer. However, if a taxpayer's only asset is a non-Massachusetts bank account or other property located outside the Commonwealth, the Department of Revenue cannot satisfy an unpaid liability of the taxpayer either by levying upon the non-Massachusetts bank account or by resort to any other collection remedy provided in G.L. c. 62C .... Thus, the collection of taxes assessed against taxpayers whose assets are located outside the Commonwealth is significantly more difficult than collection against taxpayers whose

assets are located within the Commonwealth."

Crowley's affidavit addresses auditing costs. It focuses on the "considerable expense" incurred in establishing five out-of-State regional offices "to conduct audits of the tax returns of nonresident taxpayers and resident taxpayers with income derived from sources both within and without Massachusetts ... [and] to give the Department of Revenue a visible presence outside of Massachusetts in hopes of achieving increased voluntary compliance." Crowley's affidavit states that "the administrative and travel costs associated with out-of-state audits are much higher than those of an in-state audit," and, in addition, notes the Department's lack of statutory power to compel out-of-State third-parties to comply with its subpoenas, thereby making

it more difficult to audit Massachusetts taxpayers by cross-checking the records of third parties located outside the Commonwealth.

We note that the Steele and Crowley affidavits are not limited to perceived costs associated with collecting taxes on out-of-State interest income alone, or to the cost of auditing just out-of-State interest income, but rather include collecting and auditing expenses related to all out-of-State income and nonresident taxpeyers. The Commonwealth does not explain, through the affidavits or in any other way, why out-of-State income other than interest income is not taxed at a highter rate than corresponding types of in-State income. If only taxpayers with out-of-State interest income are forced to bear additional auditing and collection costs, then on this record there is "no

reason to believe that the State's interest ... has been significantly or even-handedly advanced by the statutory means." Lewis v. BT Inv. Managers, Inc., supra 447 U.S. at 44, 100 S. Ct. at 2019. In any event, the Steele and Crowley affidavits are almost entirely conclusory in nature. They lack the specificity necessary to establish as a matter of law that there is a reasonable relationship between the costs to which they refer and a two to one tax differential. Therefore, the Commonwealth has failed to demonstrate the required "close fit" between the asserted statutory purpose of requiring interstate commerce to pay its way and the statutory means of assessing higher taxes on out-of-State interest income. Thus, the Commonwealth is not entitled to summary judgment in its favor on the commerce clause claim.

We turn now to Aronson's summary

judgment motion. As we have said, although G.L. c. 62, §§ 2(b) and 4, is facially discriminatory, it does not necessarily follow that the statute violates the commerce clause. The statute's facial discrimination merely shifts the burden to the Commonwealth to justify the statute and, on the present record, the Commonwealth has not met that burden. On the other hand, however, neither does the record sufficiently demonstrate that the statute cannot be justified so as to warrant summary judgment in Aronson's favor. We are mindful of Aronson's arguments focusing on the availability to the Commonwealth of information concerning out-of-State interest income earned by Massachusetts residents through the Internal Revenue Service and other sources, but the record is sparse, the Commonwealth has at least posited a legitimate State

purpose for the statute, and the consititutional questions this case presents are important. Therefore, we decline to order summary judgment for Aronson. See 10A C.A. Wright, A.R. Miller, & M. Kane §2732.2 at 340 (1983) (cases involving alleged violations of constitutional rights or important public issues are frequently unsuitable for summary judgment; courts often require a fuller record to decide these issues properly).

Although we remand the case for trial on the commerce clause claim, we affirm the grant of summary judgment to the Commonwealth on the other constitutional claims raised in the plaintiff's complaint. The plaintiff has not challenged the grant of summary judgment in favor of the Commonwealth on the due process and privileges and immunities claims, and she has therefore waived any

right to seek appellate review of those issues. See Mass. R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975). However, Aronson does contest on appeal the granting of the Commonwealth's motion for summary judgment as to her equal protection and art. 44 claims. In light of the Commonwealth's rationale and supporting affidavits, we are satisfied that summary judgment was properly granted as to the equal protection claim. "So long as any basis of fact can be reasonably conceived showing that the distinction made by a tax statute has a fair and rational relationship to the object sought to be accomplished, the legislative classification is not violative of equal protection principles." Seiler Corp. v. Commissioner of Revenue, 384 Mass. 635, 639, 429 N.E. 2d 11 (1981). See Madden v. Kentucky, 309 U.S. 83, 87-90, 60 S. Ct. 406, 407-

409, 84 L. Ed. 590 (1940).

The relevant portion of art. 44 is as follows: "Full power and authority are hereby given and granted to the general court to impose and levy a tax on income .... Such tax may be at different rates upon income derived from different classes of property, but shall be levied at a uniform rate throughout the commonwealth upon incomes derived from the same class of property." "[U]nder art. 44 the Legislature has considerable discretion in designating different classes of property for the purpose of setting tax rates .... That discretion is not unlimited, however. Article 44 requires uniformity of tax rates with respect to income derived 'from the same kind of property' (emphasis added) .... Properties are of the same kind unless there are 'actual underlying differences' between them" (citations

omitted). Salhanick v. Commissioner of Revenue, 391 Mass. 658, 662, 463 N.E. 2d 1163 (1984).

We agree with the Commonwealth that the collection and verification difficulties outlined in the Steele and Crowley affidavits, which were not controverted on the record, constitute "actual underlying differences" between in-State and out-of-State interest income. For that reason, we affirm the grant of summary judgment for the Commonwealth as to the art. 44 claim.

The plaintiff's argument that she should have been given an opportunity to obtain further discovery before the grant of summary judgment to the Commonwealth is not persuasive. Rule 56(f) of Mass. R. Civ. P., 365 Mass. 824 (1974), requires the plaintiff to file an affidavit explaining "that [the respondent] cannot

for reasons stated present by affidavit facts essential to justify his opposition." Id. The plaintiff did not do so.

The affidavit submitted by the plaintiff in support of her request to continue was utterly deficient. Even if, favorable to the plaintiff, we regard the memorandum alluded to in the affidavit as incorporated in the affidavit by reference, we still cannot discern whether the affidavit was sufficient for purposes of rule 56 because the plaintiff failed to include the memorandum in the record appendix. Memoranda of law filed in the trial court, when relevant to the case on appeal, must be included in the appendix. Mass. R.A. P. 18(a), as amended, 392 Mass. 1106 (1984). Otherwise, "the court may decline to permit the parties to refer to portions of the record omitted from the appendix." Id. We have insufficient information to

conclude that the judge abused her discretion.

The judge did not pass on Aronson's request that a class be certified in this proceeding. We add a comment on the intended class action aspect of this proceeding because at some stage the question may be brought forward. It is one thing to tolerate, outside normal administrative procedures, an action for declaratory relief involving one taxpayer if the issue is important and of general applicability, and thus we have not always required that the matter first be decided by the Appellate Tax Board. Where, however, an attempt is made to obtain refunds of substantial amounts of money on behalf of numerous unidentified taxpayers, the procedures of the administrative process should not be bypassed. Tax collectors and other public officials are entitled to

know what portion of collected revenues is subject to challenge and are entitled to insist on adherence to fixed schedules for timely applications for abatement and for other steps in the administrative process. We find unacceptable such an open-ended contingent liability based on an action for declaratory relief. A class should not be certified in actions of this character.

The order denying Aronson's motion for summary judgment is affirmed. The judgment in favor of the Commonwealth is reversed, and the case is remanded for a trial limited to the commerce clause claim.

So ordered.

[FOOTNOTES]

1. A minor, by Pamela Aronson, her mother.

2. General Laws c. 62, §4, as amended by St. 1975, c. 634, §41, provides in

pertinent part that: "Residents shall be taxed on their taxable income ... as follows: (a) Part A taxable income shall be taxed at the rate of ten per cent. (b) Part B taxable income shall be taxed at the rate of five per cent."

General Laws c. 62, §2(b)(1), as amended by St. 1986, c. 488, §26, defines Part A gross income as "the total interest, dividends and capital gain net income included in Massachusetts gross income, other than (A) Interest and dividends from savings deposits, including term and time deposits having a principal amount of less than one hundred thousand dollars, savings accounts, share or share savings accounts in any savings or cooperative bank, trust company or credit union incorporated in or chartered by the commonwealth; in any national bank, federal savings and loan association, federal savings bank or federal credit union located in the commonwealth; in any banking company or Morris Plan company subject to chapter one hundred and seventy-two A; in any savings or loan association under the supervision of the commissioner of banks. (B) Interest from loans made in the course of business by persons subject to the provisions of sections seventy to eight-five, inclusive, of chapter one hundred and forty." (A 1985 amendment, St. 1985, c. 583, added the words "federal savings bank"; the 1986 amendment merely changed "net capital gain" to "capital gain net income." The statute is therefore the same in all material respects as it was in 1983.)

That statute defines Part B gross income as "the remainder of the Massachusetts gross income."

"Part A taxable income" and "Part B taxable income" is computed in two stages. "Part A gross income" is reduced to "Part A adjusted gross income" pursuant to G.L. c. 62, §2(c), while "Part B gross income" is reduced to "Part B adjusted gross income" pursuant to G.L. c. 62, §2(d). General Laws c. 62, §3(A), sets forth how "Part A adjusted gross income" is reduced to "Part A taxable income," and G.L. c. 62 §3(B), sets forth how "Part B adjusted gross income" is reduced to "Part B taxable income."

3. See note 3 on page 139.

3. Interest on savings deposits in Massachusetts banks where the principal is $100,000 or more is also taxed at a ten per cent rate. See G.L. c. 62, §2(b)(1), note 2, supra.

APPENDIX B

SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH

ROOM 1412 COURT HOUSE

BOSTON, MASSACHUSETTS 02108

(617) 725-8055

JEAN M. KENNETT
Clerk

FREDERICK J. QUINLAN
Assistant Clerk

January 25, 1988

Robert Aronson, Esquire
95 State Street
Springfield, MA 01103

Dear Attorney Aronson:

RE: SJC-4268
RACHEL ARONSON
vs.
COMMONWEALTH

Your Petition for Rehearing in the above-captioned appeal has been considered by the Court and is denied.

Sincerely,

/LHW/

L. Holliey White
Assistant Clerk, pro tem

cc: Thomas A. Barnico, A.A.G.
1 Ashburton Place
Boston, MA 02108

PLEASE ADDRESS ALL CORRESPONDENCE
TO CLERK

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss: SUPERIOR COURT
CIVIL ACTION
NO. 85-397

HAMPDEN COUNTY
SUPERIOR COURT
FILED
MAR 25 1986
William J. Martin, Jr.
CLERK/MAGISTRATE

RACHEL ARONSON, pps PAMELA ARONSON,

Plaintiff,

vs.

COMMONWEALTH OF MASSACHUSETTS,

Defendant.

MEMORANDUM AND ORDER ON PLAINTIFF'S AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The plaintiff in this case challenges the constitutionality of G.L. c. 62 Section 2 & 4 which provides in part that interest in banks located outside the Commonwealth of Massachusetts are taxed at

the rate of ten per cent while those within the Commonwealth are taxed at five per cent. Based upon the pleadings, answers to interrogatories, and affidavits on file, the Court disposes of plaintiff's and defendant's motion for summary judgment as follows.

The plaintiff alleges that the imposition of a tax on interest in savings banks at different rates based on whether they are located within or without the boundaries of Massachusetts violates the equal protection clause, the due process clause, the privilege and immunities clause, and the commerce clause of the United States Constitution. At the outset, the Court notes that state income tax legislation is entitled to be given the benefit of any constitutional doubt. Daley v. State Tax Commission, 376 Mass. 861, 383 N.E. 2d 1140, 1143 (1978). The

burden of proof lies with the taxpayer to prove invalidity. The plaintiff has filed an extensive brief. The defendant likewise has filed a brief. In addition thereto, the defendant has filed affidavits of tax officials demonstrating the difficulties and expenses associated with the verification and collection of taxes on income earned in out of state bank deposits as opposed to accounts within the state. The Commonwealth suggests that the difference in the difficulty and expense of verification and collection of taxes on such income provides a rational basis for the difference in the tax rates to withstand a constitutional attack based on the equal protection clause. Madden v. Kentucky, 309 U.S. 83, 88 (1940).

The plaintiff has filed no counter-affidavit challenging the Commonwealth's

affidavit but has requested that if the Court is not going to grant its motion for summary judgment, that the Court continue their motion to allow plaintiff additional time for discovery. The Court notes that the case was filed March 20, 1985; that plaintiff filed its motion for summary judgment on October 29, 1985 with very little discovery having been undertaken; the defendant filed its motion for summary judgment on November 21, 1985; and that their motions were not heard by the Court until January, 1986. Consequently the Court is reluctant to accede to plaintiff's request for continuance and rules that summary judgment should be allowed as to the First Claim of plaintiff's amended judgment in favor of the Commonwealth since the difference in the tax rate has a rational basis which furthers a legitimate state interest.

Likewise, based on the preceding, plaintiff's second claim which rests on an allegation of violation of due process must also fail.

The plaintiff's third and fourth claims are predicated on a violation of the commerce clause and privilege and immunities clause of the United States Constitution. The Court adopts the Commonwealth's argument that the statutory provisions do not violate these clauses. The difference in the rates have a justifiable basis based on the Commonwealth's affidavits. Any burden on interstate commerce is too speculative to evoke the provision of the Commerce Clause. Andover Savings Bank v. Commissioner of Revenue, 387 Mass. 229, 245-250, 439 N.E. 2d 282, 293-295 (1982).

Lastly the plaintiff contends that G.L.c. 62 Section 2 & 4 violate Article 44

of the Amendment to the State Constitution which requires that "... (a) tax ... shall be levied at a uniform rate through the Commonwealth upon income derived from the same class of property." The Legislature has considerable discretion in designating different classes of property for the purpose of setting rates. Salhanick v. Commissioners of Revenue, 391 Mass. 658, 661 (1984). The "incidents which characterize the property" may supply a distinction between classes of property under Article 44. Barnes v. State Tax Commission, 363 Mass. 589, 594 (1983). The incident which characterized the property in question is its location and the differences in the collection procedures and expenses therefore. As such, the Court finds no violation as a matter of law of Article 44.

ORDER

The motion for summary judgment of the defendant is allowed.

The motion for summary judgment of the plaintiff is denied.

/EAP/
Elizabeth A. Porada
Justice of the Superior Court

ENTERED: March 25, 1986

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss. SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 85-397

HAMPDEN COUNTY
SUPERIOR COURT
FILED
MAR 26 1986
William J. Martin, Jr.
CLERK/MAGISTRATE

RACHEL ARONSON, pps PAMELA ARONSON,

Plaintiff,

vs.

COMMONWEALTH OF MASSACHUSETTS,

Defendant.

JUDGMENT
(SUMMARY)
(PURSUANT TO MASS R. CIV. P. 56)

This action came on to be heard before the court, Porada J. presiding, upon motions of the plaintiff Rachel Aronson, pps Pamela Aronson, and defendant Commonwealth of Mass. for summary judgment pursuant to Mass. R. Civ. P. 56 - the

parties having been heard - and the court having considered the pleadings - answers to interrogatories - and affidavits, finds there is no genuine issue as to material fact and that the defendant Commonwealth of Mass. is entitled to a judgment as a matter of law, it is ORDERED and ADJUDGED that:

COMPLAINT OF PLAINTIFF Rachel Aronson, pps Pamela Aronson, be and hereby is DISMISSED AGAINST DEFENDANT Commonwealth of Mass. without costs.

Dated at Springfield, Massachusetts, this 26th day of March 1986.

FORM OF JUDGMENT APPROVED:

/Porada J./

Associate Justice of the
Superior Court

WILLIAM J. MARTIN, JR.
CLERK

By /Christopher D. Reavey/
Assistant Clerk